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CHARLES ELMO

In The Supreme Court of The United States

OCTOBER TERM, 1932

BEMIS BROS. BAG COMPANY
vs.
UNITED STATES OF AMERICA
} No. 515

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue involving questions similar to those in the above case, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

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BRIEF AMICI CURIAE

WHEN, IN CONSIDERING A CLAIM FOR REFUND OF TAXES, THE COMMISSIONER AUDITS THE ACCOUNTS OF THE TAXPAYER AND DETERMINES AN OVERPAYMENT HE WAIVES DEFECTS IN THE CLAIM, AND IT MAY BE AMENDED.

On January 9, 1933, this Court rendered its opinion in three cases involving the right of the taxpayer to amend a claim for refund after the statutory period for filing a new claim had expired but before final rejection of the original claim. In *United States* v. *Memphis Cotton Oil Company* the Court held that a claim for refund of tax, seasonably filed, which failed to state the grounds on which refund was sought, might be amended to state specific grounds constituting the basis for a refund at any time before the claim was finally rejected, where the Commissioner in considering the claim audited the accounts of the taxpayer and found that the tax had been overpaid. In *United States* v. *Factors & Finance Company* the Court reached a similar conclusion, where the claim was amended to ask special assessment on the grounds that the invested capital of the taxpayer could not be determined and the Commissioner proceeded to act upon the claim. In *United States* v. *Prentiss & Company* the Court held that a claim for special assessment filed under Section 327(d) of the Revenue Act of 1918, which did not require the Commissioner to investigate the invested capital of the taxpayer and he did not do so, could not be amended

to set out alleged errors committed in computing the invested capital.

A similar question is now before the Court upon somewhat different facts, but a decision in favor of the taxpayer seems to be clearly indicated by the principles laid down in the cases mentioned.

There is some disposition in official sources to interpret the three decisions of the Court rendered on January 9, 1933, as laying down the principle that a claim which specified no grounds may be amended while a claim that specifies grounds may not be amended. Such a conclusion appears to be wholly unjustified when the opinions are read as a whole, finding support only in certain language used in the *Prentiss* case and then only when such language is separated from its context. There is no reason to suppose this Court intends to grant greater rights to those who disregard the regulations of the Bureau of Internal Revenue than are granted to those who attempt to comply. The proper effect of the decisions appears to be that if the claim is such as to cause the Commissioner to make a reaudit of the accounts of the taxpayer, an amendment to set up the facts disclosed by that examination is proper. If the claim is such that no reexamination is either required or made, because the claim involves the exercise of an administrative discretion and not a reexamination into the income or invested capital, as in the *Prentiss* case, an amendment to set out errors in income or in invested capital would constitute a departure under the rules of pleading and should not be permitted.

Courts have been liberal in permitting the amendment of pleadings in the interests of justice. Un-

necessary injustice will be the result unless a liberal attitude is taken with respect to amendments to claims for refund. This Court has already indicated that amendments should be allowed which do not take the Commissioner by surprise or raise issues which he has not considered.

The Revenue Acts of 1917 and 1918, especially the former, were enacted as emergency measures and there were admittedly many defects in both laws.[1] Certainly, many taxpayers must have been confused by the enactment of laws which totally changed the form of taxation especially when it is considered that three excess (war) profits tax laws were enacted within the space of two years.[2] To illustrate we quote from Mr. Montgomery's statement of the confusion caused by the term "Invested Capital."[3]

> "Both friends and enemies of any tax based on capital values, as distinguished from a tax on net income, agree that determination of the base upon which the tax must be calculated is a most difficult problem. Neither the 1917 nor the 1918 law attempts to define 'capital.' Both laws use the term 'invested capital' and purport to define it, but do so merely by stating what the term includes and what it does not include, and thus leave much to the imagination. It is expected that as soon as the country can be said to be on a post-war basis, the war profits and excess profits taxes will be abandoned never to be revived except in the case of a similar emergency."

[1] See a contemporaneous discussion of the laws in Income Tax Procedure, 1918, Robert H. Montgomery, pp. 541–543; Income Tax Procedure, 1919, Robert H. Montgomery, pp. 691, 693, 717.

[2] Income Tax Procedure, 1919, *supra*, p. 691.

[3] *Idem*, p. 717.

The taxpayers were confronted with a tax which for 1918 imposed a Federal income and excess profits tax as high as 82.4% of the income.[1] They were urged to be patriotic and to pay their high taxes and to wait until the smoke cleared to adjust discrepancies.[2] In fact, they had no other alternative than to pay such taxes as might be assessed, and rely upon a subsequent refund of so much as might be excessive.

The practice of the Bureau of Internal Revenue was also in a turmoil and continued in that state until at least 1926. The Report of the Investigation of the Bureau of Internal Revenue stated (Part I, p. 214):

> "No scientific basis has been set up by the Bureau for determining when a company is entitled to special assessment."

Again it stated (Part II, p. 267):

> "The grounds for admitting to special assessment and the method of computing same should be published for the information of the taxpayer. At present the taxpayer can not properly set up a special assessment claim without inside information."

One of the principal statutory grounds for special assessment (and the only statutory ground in 1917) was that the invested capital could not be determined. Situations have frequently arisen where the Commissioner adjusted the invested capital to omit amounts or items claimed in the return because the Commissioner found that he could not determine

[1] Senate Report No. 27, Part I, p. 216: 69th Congress, First Session, 1925–1926.

[2] Income Tax Procedure, 1918, *supra*, p. 543.

value or cost at which they should be included. Such a case was clearly one for special assessment, yet when claim therefor was filed the Commissioern would again examine the invested capital situation and finding that it was then possible to determine such cost or value, deny special assessment. This situation would develop because of the different views of investigating agents as to the *quantum* of proof necessary. Taxpayers were at the mercy of the Commissioner and never knew whether or not the Commissioner would decide that invested capital could be determined.[1]

Administrative practice brings out that the Commissioner was unwilling thus to blow both hot and cold with the taxpaying public. He adopted with the approval of the Secretary of the Treasury the broad language of Treasury Decision 3240.[2] This Treasury Decision is an example of administrative methods adopted to remedy the injustices mentioned above. The Commissioner could and did waive defects in refund claims and heard and determined them on the merits. In the *Memphis Cotton Oil Company* case the Court, after pointing this out, said:

> "In the light thus supplied in the practice of the Bureau and the analogy of pleadings, the way is clear for a conclusion. The line of division must be kept a sharp one between the function of a statute requiring the presentation

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[1] Cf. A. R. R. 6965, III–1 C. B. 416 and A. R. R. 70, 2 C. B. 287.

[2] 5 C. B. 313, approved October 31, 1921. The more detailed provisions of T. D. 4235, VII–2 C. B. 76, were not approved until October 23, 1928—long after these cases were concluded in the Bureau of Internal Revenue.

of a claim within a given period of time and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rules. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim but a claim single and indivisible, the new indissolubly welded into the structure of the old."

Since the Commissioner, in determining the tax liability on the merits, has ascertained the facts, it is clear that the evidence has not been lost and that the claim may be allowed in the amount determined by the Commissioner without prejudice due to a stale demand. Since the purpose of the statute is to protect against stale demands and the purpose of the regulation in requiring the facts to be stated is to facilitate inquiry, no violence is done to either when the claim is amended to accord with facts found by the Commissioner. Having waived any defects and having heard the case on the merits, ascertained the facts and determined an overpayment on the merits, the Commissioner should not, at the conclusion of the hearings and after sufficient amending claims have been filed, be permitted to set up a defect which he has waived.

Certainly if the Commissioner can waive the defects of a claim for refund during the trial of a

case, he can waive defects of a claim while he is in fact still considering the matter. *Tucker* v. *Alexander*, 275 U. S. 288; *Bonwit Teller & Company* v. *United States*, 283 U. S. 258.

In the *Memphis Cotton Oil Company* decision the Court further said:

> "The ultimate question presented for decision upon a claim for refund is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts then appear. * * * At once upon the filing of the claim for refund, there was an order for the complete examination of the business of the taxpayer to the end that the net amount of its tax liability might be reported to the Bureau. Every claim put forward in its amended notice has been investigated, every fact alleged in its behalf has been verified and found. The files of the Bureau contain the report of an examiner informing his superior that the tax has been overpaid, and the files of the taxpayer contain an official notice that the overassessment is recognized and that justice will be done. Of a sudden, at the end, the discovery is made that the inquiry is mere futility because the notice starting it in motion has departed in form from the requirements of a rule. * * * Long before the amendment, the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly."

In the *Prentiss* case the Court said:

"A revision for error of fact or law * * * may be made by the Commissioner on his own motion, for it is incidental to his general duty to audit the accounts."

CONCLUSION

When the Bureau has, pursuant to a claim for refund, determined facts upon which a refund is due to the taxpayer, and determined an overpayment, the Commissioner has waived any defects in the original claim and the taxpayer will be entitled to file an amending claim while the Commissioner is still considering the case on its merits.

If such amending claim sets forth facts and/or grounds which either the Commissioner should have considered under the doctrine of *Lewis* v. *Reynolds*, 284 U. S. 281, or in fact did consider, then the taxpayer is entitled to any merited refund so claimed. Such a rule harmonizes the analogy between the purpose of pleadings in a lawsuit as set forth in *Friedericksen* v. *Renard*, 247 U. S. 207, and the administrative practice of the Bureau in dealing with claims for refund.

Respectfully submitted,

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